Filed 12/13/16 Oakhurst Builders v. Saur CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

OAKHURST BUILDERS, Plaintiff and Respondent, v. JOHN K. SAUR, Defendant and Appellant.	D068860 (Super. Ct. No. 37-2013-00068982-CU-BC-CTL) ORDER MODIFYING OPINION NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on December 12, 2016, be modified as follows:

1. On page 2, immediately following the first sentence of the last paragraph, the parenthetical record reference "(2CT429, UMG # 4-5)!" is deleted.

There is no change in judgment.

NARES, Acting P. J.

Copies to: All parties

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OAKHURST BUILDERS, Plaintiff and Respondent, v. JOHN K. SAUR, Defendant and Appellant.	D068860 (Super. Ct. No. 37-2013-00068982-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Affirmed.

John K. Saur, in pro. per., for Defendant and Appellant.

Law Offices of Todd E. Kobernick, Todd E. Kobernick and Rebecca L. Schaerer for Plaintiff and Respondent.

John K. Saur, a disbarred attorney representing himself, appeals from a summary judgment of $150,037.14 for conversion of money he received in settlement of a lawsuit. Saur contends the judgment should be reversed because there are triable issues affecting

the amount of money he was required to deliver to Oakhurst Builders (Oakhurst) under a settlement agreement. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2009 Oakhurst, a general contractor, filed a lawsuit against one of its subcontractors, John Flynn, alleging Flynn performed defective glass (glazier) work on a construction project (the Oakhurst litigation). Flynn tendered defense of the Oakhurst litigation to his insurers, who denied defense and indemnity. Flynn sued his insurers for alleged "unreasonably wrongful denials," in a case entitled *Flynn v. ProBuilders Specialty Insurance Company et al.* (Super. Ct. San Diego County, 2010, No. 37-2010-00060875-CU-IC-NC) (*ProBuilders*). Saur was a licensed attorney eligible to practice law at this time, and he represented Flynn in *ProBuilders*.

In 2011, while *ProBuilders* was being litigated, Oakhurst and Flynn entered into a settlement agreement (Agreement) to resolve the Oakhurst litigation. Saur was one of the attorneys representing Flynn in this settlement, as evidenced by his signature on the Agreement, approving it "as to form" for Flynn.

Under the Agreement, Flynn stipulated to a $125,000 judgment against him in exchange for a covenant not to execute by Oakhurst.(2CT429, UMF # 4-5)! The Agreement states, in part:

> "2.1 Flynn grants to Oakhurst a judgment in the amount of one hundred and twenty five thousand dollars ($125,000.00). The amount of $125,000 is deemed to be reasonable resolution of the damages incurred in this action. This amount does not include any amount of attorneys' fees and costs incurred."

The Agreement provides that Flynn would pay the stipulated judgment from proceeds of a settlement or other resolution of *ProBuilders*. The Agreement specifies that in the event of a recovery in *ProBuilders*, first Saur would be paid his attorney fees incurred in *ProBuilders*, then court costs, and next, the stipulated judgment would be satisfied. Paragraph 2.2(b) of the Agreement provides in part:

> "[T]he Judgment will be satisfied from, and only from, the proceeds of a judgment, settlement or other manner of resolution of Flynn vs. ProBuilders or any case settlement, action or case related thereto, after payment of attorney's fees incurred in such matter to attorney John Saur ('Saur') and court costs . . . ."

Subsequently, Flynn settled *ProBuilders* for a total of $275,000 ($225,000 from ProBuilders Specialty Insurance Company and $50,000 from a Lloyd's of London entity). Saur distributed $50,000 of these proceeds to himself as attorney fees and another $50,000 to Flynn. Saur distributed $20,000 to Oakhurst's attorneys in partial satisfaction of the $125,000 stipulated judgment, but refused to disburse the remaining $105,000.

Saur asserted Oakhurst was not entitled to the full $125,000 of the stipulated judgment for two reasons. First, citing paragraph 2.2 of the Agreement, Saur asserted the $125,000 otherwise due Oakhurst must first be reduced by "attorney's fees incurred" in *ProBuilders*. He claimed that Oakhurst—who was not his client—nevertheless owed a 40 percent contingency fee on its $125,000 share of the total recovery, making the net amount due Oakhurst $75,000 (60 percent of $125,000). Saur asserted Oakhurst "is not entitled to a free ride" for attorney services that produced the *ProBuilders* settlement.

Second, Saur claimed the $75,000 should be further reduced because Oakhurst's attorney made a drafting error in the Agreement that, according to the lawyer

representing the insurer-defendants in *ProBuilders*, made the stipulated judgment unenforceable against Flynn. If that interpretation of the Agreement were to be adopted by the court in *ProBuilders*, the $125,000 stipulated judgment would not qualify as Flynn's damages in the bad faith case. According to Saur, the defense attorney in *ProBuilders* exploited this claimed error to substantially reduce the settlement value of the case. Saur argued the amount properly due Oakhurst was "questionable in these circumstances."[1]

After Saur refused to disburse any additional money, Oakhurst sued Flynn for breach of the Agreement, declaratory relief, money had and received, conversion, and fraud. Oakhurst named Saur as a defendant on the conversion cause of action.

Oakhurst filed a motion for summary judgment or, in the alternative, summary adjudication. Oakhurst asserted that contrary to Saur's interpretation of paragraph 2.2 of the Agreement, that provision governed the *order* in which settlement funds would be disbursed: first to Saur for attorney fees Flynn incurred in *ProBuilders*, next court costs, and then the first $125,000 of any remaining amount to Oakhurst. Oakhurst asserted that if the Agreement contained a mistake that reduced the settlement value of *ProBuilders*, Saur was equally responsible because he approved the Agreement "as to form." Moreover, Oakhurst asserted Flynn's obligation under the Agreement to satisfy the $125,000 stipulated judgment from proceeds in *ProBuilders* was not conditional. As

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1 Saur's brief states it is "undisputed" that Oakhurst's lawyer drafted the Agreement and stipulated judgment. However, Saur's declaration, which he filed in opposition to the summary judgment motion, admits he (Saur) drafted the stipulated judgment.

Oakhurst's attorney stated, "Nothing in the relevant documents state[s] that events occurring subsequent to the execution of relevant documents can cause the amount of the [s]tipulated [j]udgment to fluctuate."

Although conceding "[t]he basic foundational facts appear to be relatively undisputed," Flynn and Saur opposed Oakhurst's motion for summary judgment. Saur asserted Oakhurst's interpretation of paragraph 2.2 was "logically unsound" and "semantically flawed" and "there is no reason why Oakhurst should be the beneficiary of a 'free ride'" on the attorney fees incurred to achieve the *ProBuilders* settlement. Flynn and Saur also asserted Oakhurst was entitled to "considerably less" than the $125,000 stipulated judgment because of Oakhurst's "responsibility for the reduction in the settlement value" caused by the alleged drafting error.

After conducting a hearing, the court granted Oakhurst's motion for summary adjudication on all causes of action except the one for fraud.[2] Subsequently, Oakhurst voluntarily dismissed the fraud cause of action without prejudice.[3] In June 2015 the court entered judgment in favor of Oakhurst in the amount of $150,037.14, noting that

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2 Appellants did not designate a reporter's transcript on appeal, and the basis for the court's ruling is not explained in its order.

3 The parties do not address whether the dismissal *without* prejudice renders the judgment nonappealable. Because the record does not indicate the dismissal was accompanied by any agreement for future litigation, the judgment is sufficiently final to be appealable. (See *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1105.)

$105,000 was paid to Oakhurst in November 2014 and "is credited to the amount owed by Defendants."[4]

Flynn and Saur timely appealed from the judgment.

During the pendency of the appeal, we were notified the California State Bar had placed Saur on involuntary inactive enrollment status, making him ineligible to practice law. In March 2016 we notified Flynn he had 30 days to retain new counsel or proceed in propria persona. After Flynn failed to comply with that order, we deemed him to be proceeding in propria persona. In September 2016, upon Flynn's request, we dismissed his appeal. Accordingly, Saur, who represents himself, is the only appellant.[5]

DISCUSSION

I. *THE STANDARD OF REVIEW*

Summary judgment is appropriate when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc.,[6] § 437c, subd. (c).) A plaintiff may

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4 $150,037.14 is the sum of: $105,000 (amount owed under the Agreement after credit for $20,000 Saur already disbursed), plus $17,059.56 interest, $26,569.19 attorney fees, and $1,408.39 costs. Other than challenging whether the court should have granted summary judgment at all, on appeal Saur does not challenge these amounts.

5 On our own motion, we take judicial notice of the State Bar records, which show Saur was disbarred effective July 23, 2016. http://members.calbar.ca.gov/fal/member/detail/64558.) (See *In re White* (2004) 121 Cal.App.4th 1453, 1469, fn. 14 [taking judicial notice of State Bar records posted on its official Web site].)

6 All statutory references are to the Code of Civil Procedure unless otherwise specified.

meet this burden by "prov[ing] each element of the cause of action entitling the party to judgment on that cause of action." (§ 437c, subd. (p)(1).) Once the plaintiff does so, "the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (*Ibid*.) In moving for summary judgment, a plaintiff is not required to disprove affirmative defenses. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.)[7] Our review of the summary judgment ruling is de novo, and is based upon "all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

II. *THE COURT PROPERLY ENTERED SUMMARY JUDGMENT*

A. *Paragraph 2.2 of the Agreement*

Saur contends the judgment should be reversed because paragraph 2.2 of the Agreement provides the $125,000 stipulated judgment is to be reduced by "attorney fees" he claims Oakhurst owes him in *ProBuilders*. Saur asserts "there is no viable reason why Oakhurst should be the beneficiary of a free ride regarding the attorney fees necessarily incurred to achieve the settlement funds on behalf of both Flynn and Oakhurst." He

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[7] Citing *Wright v. Fireman's Fund Ins. Companies* (1992) 11 Cal.App.4th 998, 1011-1012 (*Wright*), Saur contends a plaintiff seeking summary judgment must disprove every affirmative defense. However, as *Aguilar* observed, based on amendments to the summary judgment statutes enacted after *Wright*, "summary judgment law in this state no longer requires a plaintiff moving for summary judgment to disprove any defense asserted by the defendant as well as prove each element of his own cause of action." (*Aguilar, supra,* 25 Cal.4th at p. 853 & fn. 18.)

contends the judgment should be reversed because the "maximum net amount due to Oakhurst" after paying Saur's 40 percent contingency fee is "60 [percent] of the $125,000 [s]tipulated [j]udgment, i.e., $75,000."

Contract interpretation is governed by the objective manifestation of mutual intent of the parties at the time they form the contract. The parties' intent is found, if possible, solely in the contract's written provisions. (*Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109, 1125.) "'The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" [citation], controls judicial interpretation.'" (*Ibid.*) "The parties' expressed objective intent, not their unexpressed subjective intent, governs." (*Ibid.*)

Extrinsic evidence of the parties' intent includes "objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties." (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912.)

Here, neither party offered any extrinsic evidence regarding the interpretation of paragraph 2.2 of the Agreement.[8] Accordingly, interpretation of the Agreement is a

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8 Saur's opening brief states, "the [d]eclaration of Saur and its [e]xhibits present admissible and credible parole evidence concerning the meaning which the Appellants intended the settlement agreements to express concerning the deduction of Saur's attorney fees from the [s]tipulated [j]udgment . . . ." Saur's brief does not specify to which portion(s) of his six-page, 14-paragraph declaration or 27 pages of exhibits he is referring, and it is not incumbent upon this court to search the record to find specific citations for him. (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 745

question of law that we review de novo. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; *Scheenstra v. California Dairies, Inc.* (2013) 213 Cal.App.4th 370, 390 ["[e]ven where uncontroverted evidence allows for conflicting inferences to be drawn, our Supreme Court treats the interpretation of the written contract as solely a judicial function"]; *Sprinkles v. Associated Indemnity Corp.* (2010) 188 Cal.App.4th 69, 76 ["[w]hen the facts are undisputed . . . the interpretation of a contract, including the resolution of any ambiguity, is a question of law"].)

In interpreting paragraph 2.2 of the Agreement, "'[o]ur function is to determine what, in terms and substance, is contained in the contract, not to insert what has been omitted. We do not have the power to create for the parties a contract that they did not make and cannot insert language that one party now wishes were there.'" (*Holguin v. DISH Network LLC* (2014) 229 Cal.App.4th 1310, 1323–1324.)

We begin with the terms of paragraph 2.2, which state:

> "2.2 Oakhurst agrees (a) not to record, file, nor execute on the Judgment unless there is a default or breach hereunder; and (b) the Judgment will be satisfied from, and only from, the proceeds of a judgment, settlement or other manner of resolution of Flynn vs. ProBuilders or any case settlement, action or case related thereto, after payment of attorney's fees incurred in such matter to attorney John Saur ('Saur') and court costs, and subject to satisfaction of the conditions set forth in Paragraph 2.3 below."

[appellate court will not """search through a voluminous record to discover evidence on a point raised by [a party] when his brief makes no reference to the pages where the evidence on the point can be found in the record"""]; *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738.) In any event, having reviewed Saur's declaration and attached exhibits, there is no extrinsic evidence of the parties' intent with respect to paragraph 2.2 of the Agreement.

The meaning and operation of paragraph 2.2 is clear from its plain terms. It establishes a priority among certain of Flynn's creditors upon a monetary recovery in *ProBuilders*. From any such recovery, first Saur is to be paid "attorney's fees incurred in such matter"—that is, attorney fees "incurred" in *ProBuilders*. Next, court costs incurred in *ProBuilders* are paid from any remaining funds. Third, to the extent there are funds remaining up to $125,000, the stipulated judgment is to be satisfied. The right to any funds remaining after Oakhurst is paid is unaddressed.

Under paragraph 2.2, the first distribution is to Saur for "attorney's fees incurred" in *ProBuilders.* To incur a fee is to become liable for it, "i.e., to become obligated to pay it." (*Trope v. Katz* (1995) 11 Cal.4th 274, 280, italics omitted.)

Saur does not contend Oakhurst has any *contractual* obligation to pay him for services rendered in *ProBuilders*. Saur's client in *ProBuilders* was Flynn—not Oakhurst. Saur's declaration states "Mr. Flynn . . . hired me to obtain the benefits due him from his insurers; *our agreement* calls for a 40 [percent] contingency fee for my services." (Italics added.) Saur presented no evidence of any written or oral fee agreement with Oakhurst.

Thus, for Oakhurst to "incur" attorney fees to Saur for his work in *ProBuilders*, the source of that legal obligation must be something other than in contract. However, Saur cites no any authority—no case, statute, treatise, or any other secondary source—to support the proposition that Oakhurst, a nonclient and judgment creditor of Saur's client, had a legal obligation to pay anything to Saur for his services in *ProBuilders*, much less the 40 percent Saur unilaterally demanded. Saur simply asserts, "Logically, there is no viable reason why Oakhurst should be the beneficiary of a free ride regarding the attorney

fees necessarily incurred to achieve the settlement funds on behalf of both Flynn and Oakhurst." But this is no legal analysis. It is simply a conclusion, a general abstract principle, unsupported by any explanation.

It is not this court's obligation to develop Saur's arguments for him or otherwise act as his counsel. (*Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn.1 (*Dills*).) "Mere suggestions of error without supporting argument or authority other than general abstract principles do not properly present grounds for appellate review. . . . The point is treated as waived and we pass it without further consideration." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2002) 100 Cal.App.4th 1066, 1078 .)

In any event, contrary to Saur's unsupported assertion, there are logical reasons why Oakhurst, who never was Saur's client, should not have to pay him a 40 percent contingency fee, or anything else. Starting with Saur's own declaration, he states Flynn hired him under an agreement that "calls for a 40 [percent] contingency fee for my services." Saur's declaration is conspicuously silent about whether the 40 percent contingency is based on the total recovery ($275,000), or only $150,000, which is Flynn's portion after $125,000 is paid to Oakhurst under paragraph 2.2 of the Agreement.

Moreover, paragraph 3 of the Agreement, a standard integration clause, provides, "This Agreement constitutes the entire settlement between the parties with reference to the subject matter hereof . . . ." Accordingly, if the parties intended Oakhurst to pay a 40 percent contingency fee to Saur, one would expect to see such a provision in the Agreement. Moreover, paragraph 2.7 provides, "Each party shall bear their [*sic*] own

attorney's fees and costs *in relation to* the Lawsuit." (Italics added.) Although the term "Lawsuit" is defined in the Agreement as the Oakhurst litigation, the phrase "in relation to" is broad, indicating that if the parties intended Oakhurst to bear some portion of the attorney fees incurred in the related *ProBuilders* litigation, they would have expressly so provided.

In sum, there is no evidence creating a triable issue of fact that Oakhurst incurred any legal obligation to pay attorney fees to Saur for his services in *ProBuilders*. Therefore, the court correctly determined Oakhurst is entitled to $125,000 under paragraph 2.2 of the Agreement.

B. *No Implied Condition Regarding Claimed Drafting Error*

Paragraph 2.2 of the Agreement provides for paying the stipulated judgment from the proceeds of a successful resolution of *ProBuilders*. But what if there was no successful resolution? Paragraph 2.6 provides: "If Flynn v. ProBuilders is dismissed and no judgment is obtained and no payment of funds is required by a settlement, if any, then Oakhurst may move forward with enforcement of the Judgment."

During mediation in *ProBuilders*, the insurers' lawyer asserted that paragraph 2.6 of the Agreement "was so ambiguous that it relieved [Flynn] from all obligations to Oakhurst and thereby eliminated $125,000 from his damages." Although the record is not entirely clear on this point, apparently the insurers' argument was that by negative implication paragraph 2.6 could be construed as providing that if there *was* any monetary recovery in *ProBuilders*, then Oakhurst would not be entitled to enforce the stipulated judgment.

In the *ProBuilders* mediation, the insurers' attorney argued that if his interpretation of paragraph 2.6 were adopted, the amount of the stipulated judgment would not qualify as Flynn's damages in *ProBuilders*, leaving Flynn with only the attorney fees expended in defending the Oakhurst litigation as his damages. According to Saur, this argument "had some merit" and "significantly" influenced the settlement value of the case, driving it from "at least $400,000" to the "relatively bargain-basement price of $225,000."

Saur asserts the court erred in granting summary judgment because there is a triable issue whether Flynn has a "right to an offset because of the diminution in the settlement value" of *ProBuilders* caused by the alleged drafting error.

We reject this contention because again, Saur's briefs are devoid of any legal authority to support the claimed offset. The section of Saur's opening brief entitled, "Introduction to the Appellants' Arguments" contains no legal citations. The section entitled, "There Remains a Triable Issue Concerning Oakhurst's Responsibility for the Diminished Settlement Value of the Pro-Builders Action" also contains no citation to any legal authority. A related section entitled, "Remaining Triable Issue of Fact: Were the Appellants Entitled to an Offset Because of the Drafting Flaws in the Settlement Documents?" also contains no citation to legal authority. Section 8 of the opening brief, entitled "The Controlling Law" cites three cases for the standard of review on summary judgment and nothing else.

Saur's entire reply brief cites only two cases and one statute. The two cited cases deal with a hearsay issue. None of the citations pertains to whether amounts otherwise due Oakhurst may be reduced based on the asserted drafting error. Accordingly, the issue

is forfeited. (*Dills, supra,* 28 Cal.App.4th at p. 890, fn.1; (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd., supra,* 100 Cal.App.4th at p. 1078.)

In any event, assuming without deciding there was evidence of a drafting error that adversely affected the amount of the *ProBuilders* settlement,[9] summary judgment would still be affirmed on this record. Nothing in the Agreement expressly conditions the amount due Oakhurst on the enforceability of the stipulated judgment. Moreover, Saur offered no evidence of any such oral agreement to this effect.

Thus, if Oakhurst's contractual right to collect $125,000 is conditioned on the enforceability of its stipulated judgment, such a condition would have to be implied. However, "'[i]mplied terms are not favored in the law, and should be read into contracts only upon grounds of obvious necessity.'" (*Grebow v. Mercury Ins. Co.* (2015) 241 Cal.App.4th 564, 578.) ""We do not have the power to create for the parties a contract that they did not make and cannot insert language that one party now wishes were there."" (*Id.* at p. 579.) "'Courts may find an implied term in a contract only under "limited circumstances" on grounds of "'obvious necessity'" "where the term is 'indispensable to effectuate the expressed intention of the parties.'" (*Ibid.*)

On this record, we cannot conclude there was an implied term conditioning Oakhurst's right to recover $125,000 on whether the stipulated judgment was enforceable against Flynn. Omitting such a condition might have been intentional, since both Saur

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9 Whether the Agreement contains a drafting error is not before us and we express no opinion on the issue.

and Oakhurst's attorney approved the Agreement "as to form." Moreover, the Agreement states it "shall be construed as if all parties participated in the drafting of this Agreement," and "constitutes the entire settlement between the parties with reference to the subject matter hereof . . . ." Had Saur or Flynn desired to condition Oakhurst's satisfaction of its stipulated judgment on its enforceability against Flynn's insurers in *ProBuilders*, they should have written such a provision in the Agreement. We cannot rewrite the Agreement for them.

DISPOSITION

The judgment is affirmed. Oakhurst Builders to recover costs.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.